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Chair of the FIU.net Advisory
Group

11 September 2019

██████████ C2017-0145
Please use [europol-cooperation-
board@edps.europa.eu](mailto:europol-cooperation-board@edps.europa.eu) for all
correspondence

Subject: Consultation regarding the embedment of FIU.net into SIENA

Dear ██████████,

Following up on your letters addressed to the Europol Cooperation Board on 8 July 2018 and on 8 July 2019, and acknowledging the informal exchanges we have had over the past year, I am pleased to share with you the Board's opinion on the issues and questions raised in your letter of 5 June 2018 addressed to Assistant Supervisor Wiewiórowski. In this regard, we would like to inform you that our assessment builds upon the European Data Protection Supervisor's opinion delivered in his letter of 20 July 2018, as well as the subsequent exchanges with Europol and the FIU.net Advisory Group which have been brought to our attention.

As Chair and Vice-Chair of the Europol Cooperation Board, we would like to stress that the opinion provided in this letter will remain within the remits and competences of the Board and is without prejudice to further opinion or guidance from national supervisory authorities or the European Data Protection Board established by Regulation (EU) 2016/679.

On the Europol Cooperation Board's competence and the supervision of Financial Intelligence Units

The Europol Cooperation Board (hereinafter the *Board*), composed of representatives of each Member State's national supervisory authority and the EDPS, has been established by Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol), in order to notably discuss the permissibility of the transfer, the retrieval and any communication to Europol of personal data by the Member States¹. It therefore falls within the competence of the Board to answer your questions related to the foreseen embedment of FIU.net into SIENA, a centralised application run by Europol for the exchange of information between EU law enforcement authorities.

Financial intelligence units (FIUs) have been established as per Member States' national law, initially under the provisions of Directive 91/308/EEC, with the aim of establishing links between suspicious financial transactions and underlying criminal activities in order to prevent and to combat money laundering. While the EU and national regulatory frameworks in this field have progressively been

¹ Article 45, Regulation (EU) 2016/794.

reinforced towards a more coordinated and harmonised approach, the legal status of FIUs remains, across Member States, ranging from an administrative or a law enforcement status to hybrid ones. As per national laws and depending on their legal status, the supervision of personal data processing by FIUs falls under the competence of national supervisory authorities established under Regulation (EU) 2016/679 and Directive (EU) 2016/680, and in accordance with national law. As already pointed out by the EDPS in his opinion, we would like to underline that the nature and legal status of FIUs also have, among other things, an impact on the type of information a FIU can get access to for the purposes of analysis and its other powers.

Together with the EDPS, the Board is therefore competent to assess the legal feasibility, from a data protection point of view, of the currently envisioned project to embed FIU.net into an information tool operated by Europol. However, the supervision of personal data processing by FIUs and exchange of information under the current decentralised network remains under the supervision of the concerned national competent supervisory authorities. We also would like to underline, in this regard, that the current legal framework regulating such exchanges does not foresee any coordinated supervision model, as is the case for existing EU information systems.

On the storage and exchange of FIU.net information through a European information system operated by Europol

The issues raised in the questions mentioned in your letter of 5 June 2018 have already been assessed and addressed by national data protection authorities, gathered within the Europol Joint Supervisory Body, in particular by the adoption of several opinions on the matter between 2014 and 2016. At the time, the JSB had notably considered following an assessment among its members that several national FIUs did not qualify as competent authorities within the meaning of the Europol Council Decision applicable at the time and that such legal framework did not allow for the use of SIENA for the exchange of information among FIUs.

We acknowledge that the applicable legal framework has significantly evolved since then, in particular with the adoption and entry into force of the Europol Regulation and the 4th Anti-Money Laundering Directive. The updated legal framework notably provides for a clear legal basis for Europol to act as service provider.

Following up on the EDPS' opinion, the Board is of the view that FIUs can be considered as falling under the definition of "competent authorities" as per the Europol Regulation. However, the Board points out that due to the varying nature, legal status and scope of competence of FIUs depending on the applicable national law under which they are established, personal data processing and exchanges by FIUs do not necessarily fall within the remits of the legal framework applicable to Europol's personal data processing.

The Europol Regulation indeed refers to competent authorities insofar as they are responsible under national law for preventing and combating criminal offences in respect of which Europol is competent. In this regard, the Board agrees with the EDPS legal assessment and conclusion according to which Annex II B.1 of the Europol Regulation does not allow Europol to process personal data related to data subjects for whom there is not sufficient evidence of their involvement into money-laundering or terrorist financing activities as to trigger the application of the relevant national criminal law.

The Board shares the doubts already expressed by the EDPS as to the legal possibility for Europol to embed FIU.net into SIENA or to manage FIU.net as a decentralised system, given the possibility that the Agency may be processing personal data which fall outside the scope of its mandate. The Board also takes into account that both the EDPS and Europol came to the conclusion that the option of

embedding FIU.net into SIENA without processing personal data was not feasible under the current framework².

Furthermore, the Board highlights that the legal framework currently applicable to the cooperation between Member States' FIUs in respect of exchanging information, Council Decision 2000/642/JHA, provides that FIUs shall undertake all necessary measures, including security measures, to ensure that information submitted under this Decision is not accessible by any other authorities, agencies or departments³.

The Board also notes that the recently adopted Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation of certain criminal offences, which is to be transposed by 1 August 2021 and will repeal Decision 2000/642/JHA by this same date, does not lay down an envisaged evolution of the current decentralised information exchange network used by FIUs. With regard to the exchange of information between Europol and FIUs, the new Directive foresees that “*each Member State shall ensure that its FIU is entitled to reply to duly justified requests made by Europol through the Europol national unit or, if allowed by that Member State, by direct contacts between the FIU and Europol. Such requests shall be related to financial information and financial analysis and made on a case-by-case basis within the limits of the responsibilities of Europol and for the performance of its tasks*”⁴.

In conclusion, and taking into account the elements above, the Board takes the view that the current legal frameworks applicable to Europol's processing of personal data and the exchange of information among FIUs do not allow to ascertain the legality of the embedment of FIU.net into SIENA, as an information system run by Europol. In this regard, the Board agrees with the EDPS that it is first necessary to ensure that any envisioned solution involving Europol is compatible with the Europol Regulation before dealing with any issue stemming from the application of national legal frameworks.

On the scope of personal data processed by FIUs and applicable national provisions

The Board also took note of the exchange of letters between Europol and the EDPS with regard to the nature of the information exchanged by FIUs via FIU.net and the specific issue of the concept of suspect. In this regard, we would like to fully support the interpretation provided by the EDPS according to which the concept of suspect as referred to in Annex II.B of the Europol Regulation is to be limited to cases which fall under national criminal procedural law. The Board takes the view that the concept of suspect should not be broadened so as to include the investigation of other suspicious activities by private entities and competent authorities, acting within the remit of specific laws such as the ones transposing the Anti-Money Laundering Directive.

The Board agrees with the EDPS that adopting a broad definition of suspect does not only have an impact on the possibility for Europol to embed FIU.net into SIENA, but also means that national competent authorities will be able to share data about persons who are not considered as suspects under national criminal procedure law, and therefore not granted the specific rights that can be attached to this situation.

Furthermore, the Board points out that under EU law and that of several Member States, there is no harmonised status or legal definition of the notion of suspect. Depending on the applicable national law, considering a person as “suspect” would in most cases imply the initiation of a criminal or judicial investigation, while FIUs act before any proceedings or criminal investigation is initiated. The variety of FIUs' legal status and their scope of competence, combined with the specificity of

² EDPS letter to Europol's Executive Director of 30 April 2019, C 2018-0548.

³ Council Decision 2000/642/JHA, Article 5(4).

⁴ Directive (EU) 2019/1153, Article 12(1).

each Member State's national criminal procedural law, does not provide a consistent framework which would allow to ascertain that all information and personal data to be processed under the envisioned solution would fall within the remits of Europol's competence.

Finally, the Board highlights that, on the basis of feedback received from national supervisory authorities, it appears that intelligence and information exchanged among FIUs is not always or necessarily linked to established suspicions, thus ruling out the legal competence for Europol to process such personal data.

The Board fully supports the legitimate objective of ensuring a more efficient exchange of information among FIUs and the need to provide for an efficient and up-to-date network for this purpose. Such exchange and the underlying technical infrastructure must however rely on a valid legal framework, ensuring both the full accountability of responsible entities and the protection of personal data, including the effective exercise of data subjects' rights.

The Board takes the view that the existing applicable legal framework does not allow for the embedment of FIU.net into SIENA, nor currently provides for the rolling out of a centralised system for the exchange of information among FIUs. The Board acknowledges the necessity to upgrade the current systems but recalls that any envisioned solution involving Europol and/or aiming at a more centralised system must be provided for by law and be compliant with the EU *acquis*, notably in the field of data protection.

The Board notes in this regard that Recital 22 of Directive (EU) 2019/1153 provides that “*to strengthen the cooperation between FIUs, the Commission should carry out an impact assessment in the near future to evaluate the possibility and appropriateness of establishing a coordination and support mechanism, such as an ‘EU FIU’*” and stands ready, together with each of its members, to engage in discussions and provide input to the Commission in this task.

Yours sincerely,



Chair



Vice-chair

Cc: Mr Wojciech Wiewiórowski, Assistant European Data Protection Supervisor
Ms Andrea Jelinek, Chair, European Data Protection Board
Ms Catherine De Bolle, Executive Director, Europol
Mr Laurent Muschel, Director, DG HOME
Ms Alexandra Jour Schroeder, Acting Deputy Director General, DG JUST